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No. 9244

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC FREIGHTERS COMPANY
(a corporation),
Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY,
Appellee.

APPELLANT'S REPLY BRIEF.

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1. THE NEW FREIGHT SHOULD NOT BE PRORATED BETWEEN THE VESSEL AND HER CARGO IN GENERAL AVERAGE.

The appellee impliedly concedes our statements that this is the first case in which this question has been presented to a court,[1] that general average relates to *contribution* in order to make good *loss, damage* or *expense,* that such is the ordinary definition used both by lawyers and lexicographers, and (save for one discussion upon which appellee relies but which we shall show is not to the contrary[2]) that the literature of the subject is barren of any suggestion that a receipt, gain or profit is to be distributed.

[1]Opening Brief, p. 12.
[2]Infra, pp. 4-7.

In two cases prior to the instant case, such a claim was made and rejected by the adjusters. In neither case did the claimant press the point in court.

In *Fletcher v. Alexander* (1868), L. R., 3 C. P. 375,[3] the determination of this question by the adjuster was in accord with the view taken by the adjusters in the instant case. Lowndes[4] expressed his approval of this ruling. Appellee proposes[5] that the case be distinguished because in that case the voyage terminated with the general average sacrifice while in the instant case the voyage was continued. The distinction is unsubstantial. The equities and inequities are the same in either case. The same *principle* was applied by the English adjusters as by those who acted here.

We quoted[6] from the opinion of J. Parker Kirlin, Esq., in the *Pinar del Rio* case. The portion which we quoted dealt with "cargo jettisoned" and is directly in accord with the action of the adjusters in the instant case. Appellee does not question that Mr. Kirlin expressed this opinion and that it fits the facts of the instant case. It quotes, however, a portion of his opinion dealing with "cargo transshipped from Miami,"[7] apparently seeking thereby to establish some inconsistency in Mr. Kirlin's expressions. There is no such inconsistency. Where cargo is jettisoned under the circumstances of the *Pinar del Rio* and the instant case, the denial of any right of the cargo owner to share in new freight is quite consistent with

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[3]Opening Brief, pp. 13-14, Appellee's Brief, pp. 18-20.
[4]General Average, 6th Edition, p. 109.
[5]Appellee's Brief, pp. 18-20.
[6]Opening Brief, pp. 14-16.
[7]The whole of this division of the opinion is appended as Appendix A.

Mr. Kirlin's view regarding the transshipment cost. The essence of the matter lies in the difference between freight at risk in the venture and freight not at risk because of a stipulation such as that in the charter party here that the freight should be earned, vessel or cargo lost. The point of Mr. Kirlin's opinion about the transshipped cargo was that since the vessel owner was under obligation to transship, his expense in this connection was a loss, against which he had to *credit* the new freight. Apparently, appellee quotes this passage of Mr. Kirlin's opinion to suggest that Mr. Kirlin approved in that instance the affirmative distribution of a profit in general average. His language is not susceptible of this interpretation. Mr. Kirlin's decision was that the new freight should be accounted for "so as to *offset* wholly or *as far as it will go*" the cost of transshipment. There is nothing in the opinion to suggest that an affirmative payment was to be made to the cargo owner of some portion of the new freight.

To balance Mr. Kirlin's opinion, appellee quotes from a letter of one of its advocates in the instant case. It is only fair to say that this letter is the expression of the hope of a sanguine advocate rather than an impartial decision of questions submitted. The character of the communication may well be judged by a consideration of those portions which appellee has omitted from its quotation. The letter concludes:

> "Whether or no we can make good this contention, it does seem that we should be able to at least make it good to the extent of eliminating the claim for $4,694.22 charged to the cargo, because the ship-owner has lost nothing, and by the present adjustment would

be a gainer to the extent of about $21,000.00 by having put into a port of distress.[8]

Under any view of the foregoing, the amount involved, and the inequity of the claim, would seem to warrant us in making the attempt.

So far as your remedy is concerned, I am inclined to the opinion that we should bring an action against the vessel for contribution in general average under the foregoing theory, and in such action, we might adopt the present adjustment as a basis, and ask the Court for such a sum as, by the amended adjustment upon the foregoing principle, the cargo may be entitled to. According to my present information, there should be a net cash balance due the cargo-owner of $7,224.72, instead of a charge against him of $4,694.22.''

The letter really adds nothing to advocate's brief in this court. It is simply based upon the passage quoted from Gourlie[9] which was misapplied by the writer of the letter in the same way that it is by the writer of the brief.

The only published matter to which appellee points, as a suggestion that a receipt, gain or profit may be distributed in general average, is a report of some proceedings at which proposed amendments of the York-Antwerp Rules were considered.[10] As appellee says, the proposed paragraph was rejected. Appellee is mistaken, however,

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[8]The statement that the shipowner ''lost nothing'' and is a ''gainer'' under the present adjustment to the extent of about $21,000 is hardly a fair estimate of the actual situation. At the port of refuge, appellant was required to expend far more than the amount of the new freight to repair the storm damage and to fit the vessel to proceed on her voyage (Ap. 97). This expense was particular average to which the cargo did not contribute in any way.

[9]Appellee's Brief, p. 15, infra, p. 8.

[10]Appellee's Brief, pp. 9, 22-23, 1924 A.M.C.

in its view that even the proposal of this paragraph was a suggestion that the law of general average be changed so as to permit the distribution of a receipt, gain or profit. The meaning of the rejected paragraph is clear when it is considered in connection with the remainder of Rule XV as proposed at the Stockholm conference. The proposal was to amend Rule XV to read:

"RULE XV.—Loss of Freight.

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Deduction shall be made from the amount of gross freight lost of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

When the voyage is continued, credit shall also be given for freight earned on goods carried in lieu of goods sacrificed, less expenses actually incurred in earning such freight, including an allowance for extra detention of the vessel due solely to the engagement and loading of the new cargo."

So modified, Rule XV would have expressed the law just as stated by us in our opening brief. The rule would deal with the subject "Loss of Freight." Every sentence of the rule would be limited to this subject. A loss of freight can occur only where the freight is at risk, that is, where the freight has not been absolutely prepaid as it was in this case. The proposed Rule XV then would provide that where the freight had been at risk and was lost by a general average sacrifice and was to be made good in general average, then when the voyage continues

credit shall be given for net new freights. The proposed paragraph did not deal with a case as here where the freight was absolutely prepaid, there was no freight at risk and therefore there could be no loss of freight to be made good in general average. The proposed paragraph did not apply to a case as here where under the first York-Antwerp Rule (1890) the jettison of the deck cargo was not to be made good in general average and therefore no loss of deck cargo freight could be made good in general average. The proposed Rule XV would mean nothing different from the law as already expressed by us, that where the freight was at risk and its loss made good in general average, that loss "would have been reduced by the net amount of the new freight,"[11] but where no loss of freight was to be made good in general average there could not be an affirmative distribution of the profit from the new freight. The proposed paragraph to be included in Rule XV only provided for a *credit* of the net new freight against the loss of the old freight. It did not provide for an affirmative distribution of the freight received. All this is made particularly clear by the discussions which took place under the auspices of the Chamber of Commerce of the United States regarding the use of the 1924 rules by American merchants. At the New York meeting, April 23, 1925, a recommendation from the Merchants Association of New York was submitted which urged the very paragraph rejected at the Stockholm conference, upon which appellee relies so strongly. Explaining this recommendation, that committee urged that

[11]Opening Brief, p. 12, citing Baily, General Average, 2d ed., p. 134; Lowndes, General Average, 6th ed., pp. 348, 783; see also Opening Brief, p. 18.

> "* * * where allowances are made in general average for loss of freight and the space occupied by goods destroyed is subsequently filled by other cargo and freight thereon earned, the net freight, after allowing for the expenses and loss of time to the ship, should go to the reduction of general average loss" (Report of Proceedings of American Committee on General Average Rules, April 23, 1925, p. 10).

Subsequent discussion made it clear that the practice of American adjusters is in accordance with the principles laid down in our opening brief and above.

> "*Mr. Congdon* stated that the present practice is to credit new freight to the General Average when the original freight was collect, but not to credit it when the original freight was prepaid" (Report of Proceedings of American Committee on General Average Rules, April 23, 1925, p. 16).

The difference between adjusters which the Stockholm conference did not resolve, did not concern the question involved in the instant case of distributing the new freight received by the shipowner where the old freight had not been at risk, but whether the practice of American and English adjusters, where freight had been at risk, of crediting against a loss of freight the amount of any net substituted freights, should be crystallized in the rules so as to override contrary practices of the adjusters of other countries.

So far as those texts which appellee cites deal with this question of new freight, they are in accord with the law as above expressed.

Thus, Congdon[12] simply says that:

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[12]General Average, 2nd Edition, p. 64, Appellee's Brief, pp. 8, 23.

> "* * * the net freight earned on the new cargo should be *credited against the allowance for freight on the cargo sacrificed.*"

He does not say that where there was no freight at risk and where there was no allowance to the shipowner for freight on cargo sacrificed, the net new freight was to be taken from the shipowner and distributed. Nothing in Congdon suggests the distribution of a "general average profit."

The same is true of the passage from Gourlie upon which counsel's opinion is based.[13] "The new freight," says he, "cancels the loss that would otherwise arise from the original sacrifice." On the same page, he says: "An absolutely prepaid freight does not *eo nomine* contribute; neither is it contributed for." In such cases, there could be no "loss" for the new freight to "cancel." The first sentence of the quotation, "The shipowner may not by the jettison be in anywise a gainer," must be read in view of the rest of the paragraph and the captions under which it stands, "The method of ascertaining the amounts to be made good,"[14] and "allowances for freight."[15] It means that the shipowner may not obtain an allowance for loss of freight, and then pocket the profit on new freight for substitute cargo. Nowhere does Gourlie suggest that a "general average profit" may be distributed.

The various sections cited by appellee from Carver[16] fail to sustain the argument that profits are to be dis-

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[13]Supra, p. 4.
[14]Page 462.
[15]Page 486.
[16]Carriage by Sea, 8th Edition,
section 375, p. 547, Appellee's Brief, pp. 9, 20;
section 403, p. 575, Appellee's Brief, pp. 9, 21;
section 415, p. 591, Appellee's Brief, pp. 8, 14.

tributed in general average. They deal solely with contribution to make good sacrifices. Nothing in Carver's book intimates anything about the distribution of profits.

Appellee also relies upon Lowndes on General Average, 6th Edition. The quotation[17] is from *Fletcher v. Alexander.* It deals simply with contribution to make good a loss, not with distribution of a profit. The same is true of the second quotation.[18] It relates to the determination of the *contributing interests* and has nothing whatever to do with *distribution of profits.* This matter of contributing interests is also the subject of the third quotation.[19] As we have said,[20] throughout his book Lowndes is consistent in describing general average as a matter of contribution to make good losses. Nowhere does he intimate that it is a matter of the distribution of receipts, gains or profits.

Appellee relies upon *The Strathdon,* 101 Fed. 603. The quotation, however,[21] is from the opinion of the District Court.[22] This was a suit for contribution to make good a general average sacrifice. The opinion cites[23] the classic definition of general average by the Supreme Court in *Star of Hope,* 9 Wall. 203, 228.[24] Nothing in that opinion nor in the opinion of the Circuit Court of Appeals suggests anything about distribution of a receipt, gain or profit.

Appellee cites *Williams v. The London Assurance Company,* 1 M. & S. 318.[25] This case involved the determina-

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[17]Lowndes, p. 308, Appellee's Brief, p. 14.
[18]Lowndes, p. 358, Appellee's Brief, pp. 8, 14.
[19]Lowndes, p. 377, Appellee's Brief, p. 24.
[20]Opening Brief, p. 13.
[21]Appellee's Brief, pp. 8, 13-14.
[22]94 Fed. 206.
[23]Page 208.
[24]Opening Brief, p. 13.
[25]Appellee's Brief, pp. 27-28.

tion of what were the interests which should contribute to make good a general average loss. Nothing in it suggests that general average involves the distribution of a profit.

In this connection, appellee also seems to rely upon *Barclay v. Stirling,* 5 M. & S. 6.[26] The case discusses no question of general average.

Appellee cites also *Chellew v. Royal Commission,* 2 K. B. (1921) 627.[27] This involved the question of what interests should contribute to make good a loss. It does not suggest anything about distributing a profit.

Considered as a whole, these authorities of appellee's confirm what we have said all along that general average relates to contribution in order to make good loss, damage or expense, not to the distribution of a receipt, gain or profit.[28]

Much of appellee's argument is devoted to a general charge of "inequity" against the adjustment,[29] the assertion that it gave appellant the advantage,[30] the complaint that it did not place the parties on an equal footing,[31] the claim that by it appellant "profited" over appellee.[32] All these things seem to have been said without giving consideration to the real equities of the parties. In the instant case, it is purely an accident that the deck cargo was sold to the same purchaser as the underdeck cargo. It is in the latter capacity alone that appellee asserts its

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[26]Appellee's Brief, p. 8, infra, p. 17.
[27]Appellee's Brief, pp. 8, 29-31.
[28]Opening Brief, p. 13.
[29]Appellee's Brief, pp. 10-12, 13.
[30]Appellee's Brief, pp. 12-13.
[31]Appellee's Brief, pp. 13-14.
[32]Appellee's Brief, p. 35.

claim in general average for a *distributive share* in the new freight. The equities of the rule for which appellee contends in its effort to support such a claim must be tested, not with reference to the accident of this case, in which the same man owned the deck cargo as the underdeck cargo, but with reference to the general situation where the deck cargo is owned by one and the underdeck cargo by another. In such a case, it must be obvious that no equity is served by giving the owner of the underdeck cargo a share in the new freight, the ability to earn which was created by the jettison of the goods of the deck cargo owner. The fact that the deck cargo owner has suffered a loss by the jettison cannot furnish a basis for giving the owner of the underdeck cargo a profit to the earning of which he has contributed nothing. Moreover, if, as appellee claims, the owner of the underdeck cargo is entitled to a share of the freight on the new deck cargo in the instant case, where the freights were absolutely prepaid, the same must be true where the freights are not absolutely prepaid. In such a case, if appellant's claims are to be sustained, the vessel owner would have lost the freight on the jettisoned deck cargo, but under the first York-Antwerp Rule (1890) would have been unable to recoup that loss through *contribution* in general average, and under the rule for which appellee contends, would be unable to make it good by shipping a new deck cargo without *distributing* a portion of the new freight to the owner of the underdeck cargo. The result of appellee's contentions in such a case would be to give the owner of the underdeck cargo an unearned profit and to make it impossible for the vessel owner to use his own property to make good his own loss. This demonstrates the essential inequity of the rule

for which appellee contends. Whatever inequity inheres in the adjustment actually made in this case, it is only apparent inequity. It does not arise by virtue of any error in the law of general average as applied by the adjusters, but is the necessary consequence of the provisions of the charter party voluntarily framed by the parties to the venture. In any case where freight is absolutely prepaid and the cargo is lost, an apparent inequity results. The inequity, however, is only apparent. The practical convenience of putting the transaction in that form has led commercial men to adopt that method of doing business. No real inequity results. Insurance problems are simplified. The vessel owner does not have to insure the freight. One policy carried by the cargo owner covers the whole risk. The "inequity" of which appellee complains here is simply the necessary consequence of the terms of the charter party. There is nothing wrong with the principles of general average applied by the adjusters.

Allied to this is the contention of appellee that the rule of general average must be as claimed by it in order to preserve the impartiality of the Master in considering a jettison.[33] In this connection, appellee cites *The Mary F. Barrett,* 279 Fed. 329.[34] Like other cases cited by appellee, that was a suit by the owner of jettisoned cargo in which the court ordered *contribution* to make good his *loss.* From the decision of the lower court,[35] it appears that both deck and underdeck cargo were jettisoned; nothing in either opinion shows whether or not the York-Antwerp

[33]Appellee's Brief, pp. 9, 36-39.
[34]Appellee's Brief, pp. 9, 37.
[35]270 Fed. 618.

Rules governed; the first York-Antwerp Rule (1890) was not involved. In the instant case that rule is involved. It is not necessary here to review the numerous reasons why shipping men framed that rule. It is sufficient to say that it provides expressly that no jettison of deck cargo shall be made good as general average.[36] The effect is, of course, that when jettison of deck cargo is concerned, the Master is not impartial. So far as the vessel owner's interests are concerned, under this rule it is always cheaper to jettison deck cargo than anything else. In the face of the first York-Antwerp Rule (1890), it is idle to talk of impartiality of the Master. By this, we do not mean that where shipments are made under charters embodying the York-Antwerp Rules of 1890 there is any disposition on the part of masters to sacrifice deck cargoes improperly. We cannot believe that ship masters in time of peril search through the vessel's records and read the fine print on the charter party. It is clear, however, that the owners of underdeck cargo are entitled to this advantage under the first York-Antwerp Rule (1890), that in determining whether or not to sacrifice a deck cargo and save an underdeck cargo, the Master shall not be troubled by the fear that his employer will have to pay a general average contribution to the owner of the deck cargo. If the adjustment in the instant case in any way deprives the Master of his ordinary impartiality, this is due, not to the principles of general average applied by the adjusters, but simply to the first York-Antwerp Rule (1890).

Appellee devotes a section of its brief to demonstrating that "the new freight was earned by a general average

[36]Appellee's Brief, p. 2, note 2.

act'' and makes similar assertions in other portions of its brief.[37] Rather frankly, appellee concedes that this is merely a verbal position, saying ''that while jettison was a general average act, the cargo jettisoned was not entitled to contribution because of the contract between the ship owner and the cargo owner, incorporating the York-Antwerp Rules of 1890, Rule 1 of which provides that no jettison of deck cargo shall be made good as general average.''[38] It must seem quite idle to discuss whether a particular ''jettison'' is or is not a ''general average act'' when all concede that no loss thereby occasioned may be made good in general average. The essential thing is that since the loss is not to be made good in general average, this in itself destroys every possible argument in support of appellee's claim that a profit thereby earned is to be distributed in general average.

Appellee evinces some disposition to confuse matters by various uses of the word ''benefit.'' In some way, this seems to be involved in appellee's argument that in determining contributing interests ''prepaid freight must be added to the value of the cargo.''[39] This last is an inaccurate expression. More nearly accurate is appellee's earlier phrase ''the saved cargo at its market value at the port of destination, which included the freight paid at the port of departure,''[40] that is, from which the freight was not deducted.[41] The difficulty about this word ''benefit'' is apparent when we find it used to describe:

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[37]Appellee's Brief, pp. 8, 13, 35.
[38]Appellee's Brief, p. 21.
[39]Appellee's Brief, p. 24; see also p. 10.
[40]Appellee's Brief, p. 10.
[41]See Apostles, p. 98.

(1) to the vessel owner

(a) the deduction of particular average repairs from the contributory value of the vessel,

(b) "the sound value of the vessel at Capetown ($75,000.00), less the cost of repairs,"[42]

(2) to the cargo, "the market value at Capetown,"[43] and

(3) "the new freight, a benefit received."[44]

The word "benefit" is frequently used in the literature of general average to denote the extent to which the general average sacrifice has resulted in the saving of the property not sacrificed. The contribution to make good the sacrifice is ordinarily computed in proportion to these "benefits." In this sense, the above usages (1)(b) and (2) are correct. If the word must be used in the senses (1)(a) and (3), it must be remembered that a different meaning is intended. Appellee's adoption of usage number (3) leads to a strange result. The new freight, says he, is one of the ultimate benefits of the voyage and that "freight must therefore contribute." If the freight is really one of the benefits like the saved cargo and the saved vessel, then it may be that as one of the contributing interests it should contribute to the general average expense at the port of refuge. There is nothing, however, in any principle of general average which requires that one of the contributing interests should be totally divided between the other two.

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[42]Appellee's Brief, p. 11.
[43]Appellee's Brief, pp. 11-12.
[44]Appellee's Brief, pp. 12, 24.

Speaking further of "benefits," appellee says that "the owner of the vessel received the benefit [of the particular average charges at the port of refuge] by having them deducted from the contributory value of the vessel."[45] This assertion exposes another fallacy in appellee's criticism of the adjustment, both from the standpoint of the equities of the situation and from that of the principles of general average.

It is true that the particular average charges at the port of refuge were deducted from the contributory value of the vessel, and that, by reason of this deduction, the amount of the general average expenses payable by the vessel was reduced. This was in accordance with the settled and equitable principle of general average that losses are proportioned to the values of the interests saved by the general average act. Under this principle the contributory interests pay *less* in proportion as their uncompensated losses are greater. But on appellee's theory that in addition to the contribution to make good the general average losses there should be a pro rata distribution of the new freight, the particular average losses which the vessel was unfortunate enough to suffer would become not a "benefit" but a positive detriment. Under this theory the vessel would receive a *smaller* amount of the new freight in proportion as its particular average losses were *greater,* while the cargo would recover *more* in proportion as its particular average losses were *less.* In the case at bar, the underdeck cargo suffered no damage whatsoever. Accordingly, under appellee's theory, it would share in the new freight in proportion to its full value. At the same time,

[45] Appellee's Brief, p. 11.

the vessel's share would be reduced in proportion to the large amount of particular average losses it suffered by reason of the disaster. This startling result demonstrates, we submit, not only the inequity of appellee's position, but also—as is held by all the authorities—that the principles of general average are applicable only to *contribution* for *losses,* and never were intended to, and cannot practicably and equitably, apply to the *distribution* of a *profit.*

Appellee advances one group of contentions quite inconsistent with its claim in this case. The burden of these two contentions is not that appellee is entitled to a distribution of a *portion* of the new freight, but that appellee's assignor was entitled to the *whole* of the new freight.

The first of these arguments is "that in prepaying the freight at the port of loading * * * the cargo owner virtually stands in the shoes of an insurer to the ship of the full freight of the vessel. As an insurer * * * the cargo owner would be entitled to have the new extra freight paid at the port of distress, credited to its liability for the full freight," citing *Barclay v. Stirling,* 5 M. & S. 6.[46] That was a simple insurance case. It involved no question of general average and no such question as is presented by this particular argument of appellee's, that appellee, as cargo owner, stands in the position of an insurer. Appellee's effort is to turn a charter party into an insurance policy, to ascribe to a charter party those incidents which arise out of a contract of insurance. In addition to *Barclay v. Stirling,* appellee cites Coe on General Average, p. 67, and Lowndes on General Average,

[46]Appellee's Brief, p. 25.

6th Edition, p. 783.[47] The works cited do not discuss this argument of appellee. All that can be said is that a charter party is one thing and an insurance policy is something else and that the incidents of one are not the incidents of the other.

But appellee has another and entirely different argument in support of its claim for the whole freight.[48] Appellee's discussion of this point is based upon one misapprehension of fact. Throughout the discussion, appellee says that the charterer sold the cargo to appellee's assignor, c. i. f.[49] As purchaser of the cargo under a c. i. f. contract, appellee then argues that its assignor became in effect the assignee of the charter party,[50] or even "was the party of the second part under the charter party."[51] In support of this contention, appellee quotes from a deposition *not in the Apostles,*[52] and from an "affidavit" *not in the Apostles,* NOT FILED IN THE LOWER COURT, not even signed by the witness, nor shown to counsel before it was mentioned in Appellee's Brief.[53] If the matter be material, then so far as the deposition is concerned, the court may care to know that the passage immediately following appellee's quotation from the deposition contradicted the quotation. The next question and answer were:

> "Q. How was the insurance arranged? A. We stipulated, at the time of purchase, that we should be

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[47]Appellee's Brief, p. 27.
[48]Appellee's Brief, pp. 9, 31-36.
[49]Appellee's Brief, pp. 5, 31, 32, 33 and 34.
[50]Appellee's Brief, p. 34.
[51]Appellee's Brief, p. 34.
[52]Appellee's Brief, p. 34.
[53]Pages 32-33.

allowed to provide our own cover, subject to suitable allowance in respect to the premium which they had included in their c. i. f. price.''[54]

That is, the sale was not c. i. f., but "c. & f." The pleadings do not allege a c. i. f. sale, but simply that the charterer "sold and transferred said cargo to said Smith, Kirkpatrick & Co., Inc."[55] The sales contract is not before the court. There were several bills of lading.[56] If these bills of lading had been assigned to different purchasers, which purchaser would have been assignee of the charter party? Where a charter party and bills of lading are held by separate parties each constitutes a separate contract, with different rights and liabilities.

Field Line (Cardiff), Limited, v. South Atlantic S. S. Line, 201 Fed. 301.

This is true where a bill of lading issued to a charterer has been endorsed to another.

Leduc v. Ward (1888), 20 Q. B. D. 475, 479;

The Fri, 154 Fed. 333, 336-337.

The charterer itself could not have shipped additional cargo without paying additional freight. Its successor in business did ship additional cargo,[57] paid the additional freight, and then sold the additional cargo to libelant's assignor.[58] Appellee relies upon *The Port Adelaide,* 62 Fed. 486, 59 Fed. 174,[59] as holding that the charterer had the right to ship additional cargo free. This was true in that case because the charter fixed the freight at a flat

[54]Page 3.
[55]Apostles, p. 3.
[56]Stipulation for Submission of Cause, Ap. p. 70.
[57]Apostles, pp. 68-69.
[58]Apostles, pp. 43-45.
[59]Appellee's Brief, pp. 9, 34-35.

sum irrespective of the amount shipped.[60] Our charter fixed the freight at $52.50 per thousand feet shipped. It resembles the charter of *The Wergeland,* 262 Fed. 785. That case was similar to the instant case, save that the vessel owner took on additional cargo, not from the charterer, as here, but from a third party, not at the charter freight, as here, but at a higher freight. The vessel was held accountable to the charterer, not for the whole new freight, but only for the profit on that freight over and above the charter rate which the charterer would have had to pay. Nothing in the authorities cited by appellee, *Poor on Charter Parties,* Sec. 31, page 75, or *Christie v. Davis Coal and Coke Co.,* 110 Fed. 1006, 95 Fed. 837,[61] is contrary to this.

Both of these theories upon which appellee asserts its assignor's right to the whole new freight, rather than a proportion of it to be obtained in general average, resemble the contention originally advanced by appellee,[62] not only in their general nature, but also in the fact that they are quite inconsistent with the demand here asserted for only a portion of the new freight to be distributed in general average. This contention of appellee's at the outset was characterized by its assignor as "intolerable delay,"[63] "raising one question after another,"[64] and "a totally new contention which is wholly contrary to the views held by all our adjusters and other Underwriters here."[65]

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[60]59 Fed. 175.
[61]Appellee's Brief, p. 36.
[62]Apostles, pp. 45-46.
[63]Apostles, p. 46.
[64]Apostles, p. 43.
[65]Apostles, p. 43.

The foregoing, we submit, has demonstrated the unsoundness of contentions of this sort. *But even if they were sound they could not avail appellee.* The most they could show would be a cause of action in favor of appellee's assignor inconsistent with appellee's theory in this case and not available to the appellee because the assignment to appellee only covered moneys due in general average.[66]

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2. IN ANY EVENT, THE ONLY THING TO BE CONSIDERED SHOULD BE THE NET FREIGHT, NOT THE GROSS FREIGHT.

Appellee does not question the authorities cited by us[67] to the effect that in general average consideration is given only to net freight after deducting subsequent expenses incurred to earn it. This is made even clearer by the proposed addition to the York-Antwerp Rule XV considered at the Stockholm conference upon which appellee relies so strongly. This relates to "freight earned on goods carried in lieu of goods sacrificed, *less expenses actually incurred in earning such freight,* etc."[68] When quoting this paragraph in another connection, appellee appends a note that it will "hereafter indicate" why this language does not defeat its claim for the *gross* freight. The promise is not fulfilled. Appellee's discussion of this point[69] seems to concede the legal principle upon which we rely and to be based upon a contention that as a matter of fact there were no expenditures in earning the new freight. Of course, such a contention

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[66]Apostles, p. 14.
[67]Opening Brief, pp. 18-20.
[68]Appellee's Brief, p. 22.
[69]Appellee's Brief, pp. 40-41.

of fact cannot justify the action of the District Court in prescribing that only the gross freight should be taken into account, thus foreclosing appellant from establishing the expenses. Nevertheless, the record does show that there were expenses attributable solely to the carriage of the new deck cargo. There was a managing commission,[70] an allowance to the charterer for transporting the cargo to San Francisco for loading instead of loading at Puget Sound,[71] the cost of loading the new cargo,[72] tallying it,[73] storage on it,[74] and part of the crew's wages and provisions during the time they were waiting for and loading the new cargo.[75] Appellee is simply in error if he means to express the contrary by his statements that "the expense incurred * * * related to the saved cargo,[76] that the "expenditures * * * made were not for the purpose of carrying the new cargo forward."[77] Appellee cites Carver.[78] Nothing in what this author says indicates that as a matter of law, gross freight is to be considered. In another portion of his work,[79] this author makes it clear that net freight is to be considered just as stated in the authorities cited by us.[80]

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[70]Apostles, p. 68.
[71]Apostles, p. 69.
[72]Adjustment, p. 80.
[73]Adjustment, p. 82.
[74]Adjustment, p. 124.
[75]Adjustment, p. 154.
[76]Appellee's Brief, p. 10.
[77]Appellee's Brief, p. 41.
[78]Sec. 302, p. 459, Appellee's Brief, pp. 10, 40.
[79]Section 436, p. 613.
[80]Opening Brief, pp. 18-19.

3. CONCLUSION.

We respectfully submit that the adjustment made in this case is in accordance with the authorities, that there is no contrary authority, that it is in accordance with the practice of American and English Adjusters and the advisers of appellee's assignor,[81] and that it is equitable and fair, and therefore that the decree should be reversed.

Dated, San Francisco, California,
November 13, 1939.

Respectfully submitted,
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(Appendix A Follows.)

[81] Supra, p. 20.

Appendix A.

Appendix A

EXCERPT FROM OPINION OF J. PARKER KIRLIN, ESQ., IN THE PINAR DEL RIO.

(See footnote 7, p. 2, supra.)

d. Cargo transshipped from Miami. That cargo was in such condition that after the ship was repaired she might have reloaded it by having it brought out to her in barges. It was, however, considered less expensive and for the best interest of all to have it transshipped. The expense of transshipment was obviously due to a general average act, and, therefore, constitutes a general average charge. The original freight on the cargo which was subsequently transshipped was paid in exchange for an obligation of the shipowner to carry forward and deliver that cargo unless prevented by unexpected perils. The bill of lading did not provide that the shipowner could keep the freight without performing the obligation of carriage, except in one of two contingencies: 1, the loss of the ship, or, 2, the loss of the goods. As neither of these things occurred with reference to the cargo transshipped from Miami, the ship remained under an obligation to reload that cargo after being repaired, and carry it forward, or, in the special circumstances, to bear her ratable share of the cost of forwarding it. The net freight on new cargo shipped in the space occupied by the cargo so transshipped must, therefore, in some form or manner, be accounted for in general average, so as to offset wholly, or as far as it will go, the general average expenses in connection with the forwarding. The shipowner will be debited in the general average with his proportion of the cost of transshipment, but against this charge he will receive a credit, through the medium of general average, of his ratable proportion of the net freight on the fresh cargo shipped in place of it, which, presumably, will wipe out the debit.